UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

METRIS U.S.A., INC., METRIS N.V., METRIS IPR N.V., and 3-D SCANNERS LTD., Plaintiffs, v. FARO TECHNOLOGIES INC., Defendant.	))))))))))))	 **Civil Action No.: 08-cv-11187(PBS)** **ORAL ARGUMENT REQUESTED**

COUNTERCLAIM DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO FARO'S ANTITRUST AND UNFAIR COMPETITION COUNTERCLAIMS (COUNTERCLAIM COUNTS VII – IX)

[PUBLIC VERSION]

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Counterclaim Defendants (collectively "Nikon Metrology") hereby move for summary judgment as to Counterclaimant Faro Technologies Inc.'s antitrust and unfair competition counterclaims (Counterclaim Counts VII - IX).

REQUEST FOR ORAL ARGUMENT

Nikon Metrology hereby requests oral argument on this Motion.

I.
INTRODUCTION

Faro has doubled down on inequitable conduct in this case. Faro has not only alleged inequitable conduct (which is now being tried before this Court), it also seeks to turn those allegations into an offensive weapon. Faro has brought three counterclaims – two federal antitrust monopolization claims and a state law unfair competition claim – all founded on Faro's allegations that this infringement lawsuit is based on patents obtained through fraud on the patent office.

But allegations of inequitable conduct are not so easily turned into antitrust swords. Faro's antitrust counterclaims require much more; they require that Faro prove all the elements of attempted monopolization, including that this lawsuit raises the specter that Nikon Metrology will gain monopoly power and that the lawsuit has harmed market-wide competition, not just Faro as a competitor. Faro's unfair competition claim also requires more – conduct that does not turn entirely on federal patent law – or it is preempted.

Peeling back the thin veneer of Faro's allegations reveals that Faro does not have more. It does not have evidence upon which a jury could find a dangerous probability of monopolization. In fact, its own executives and experts offer testimony and opinions that would contradict such a finding. Faro also has no evidence that competition as a whole has been harmed. And its unfair competition claim is nothing more than a recast version of its inequitable conduct case.

Because Faro cannot present evidence sufficient to establish a genuine issue of material fact as to key elements of its antitrust and unfair competition counterclaims, the Court should enter summary judgment against each of these counterclaims.

II.
FACTUAL BACKGROUND

A. The Patents and Products at Issue.

The patents-in-suit and the accused products are in the field of metrology – the science of measurement. Metrology products today do more than measure the distance from point to point. They are now used to measure the relationship of points in three-dimensional (3D) space, allowing for the creation of highly accurate digital models of three-dimensional physical objects.

The products at issue in this case involve one type of metrology system – a combination of a laser scanner with a multiply-jointed articulated arm. (Counterclaim Defendants' Statement of Material Facts ("SMF") ¶ 1.) (Figure 1.) A laser scanner (sometimes called a laser line probe or LLP) emits a light stripe, which reflects off of the object to be measured, allowing for the calculation of the distance between the scanner and the object at every point along the emitted stripe through laser triangulation technology. (SMF ¶ 2.) An articulated arm can be used to precisely determine the position of an attached scanner in 3D space. (SMF ¶ 3.) An arm-mounted laser scanner requires the combination of data regarding the distance between the laser scanner and an object with data regarding the position and orientation of the laser scanner in 3D space. (SMF ¶ 4.) As the laser scanner is passed over an object, the combination of data is used to create a 3D digital model of the surface of the scanned object. (SMF ¶ 5.) (Figure 2.) These digital models are used for a number of purposes, such as quality control inspection and reverse-engineering. (SMF ¶ 6.)

Figure 1

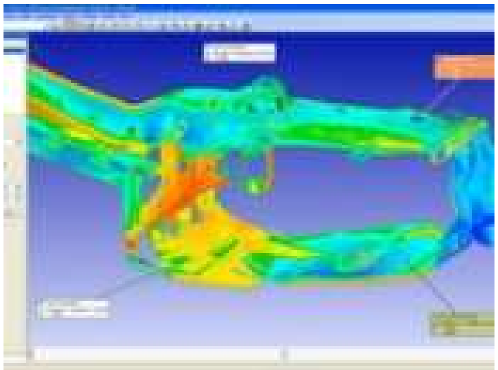

Figure 2

Mounting a laser scanner on an articulated arm, however, presents a number of complicated technical issues that must be resolved to enable the accurate and efficient creation of 3D models. (SMF ¶ 7.) The patents-in-suit claim inventions that solve these problems.

First, the data from the two devices must be accurately synchronized. As it moves over an object, a laser scanner collects data from hundreds of points along the light stripe at a rate of 30 times per second. At the same time, the articulated arm provides position data at a rate of 25-125 times per second. The combination of small variations in the data from the scanner with variations from the arm "can cause large aggregate errors." (SMF ¶ 8.) Synchronization of the data, with accuracy down to the millisecond, is therefore critical to achieve optimal results. Thus, one claimed invention – "synch and trigger" – solves the problem of the synchronization of the data capture between these two systems. (SMF ¶ 8.)

Second, a laser scanner cannot easily capture certain features on an object, such as deep hollows. For such features, a touch probe – a device used to measure a single point by physically touching the measured object – is needed to render the complete 3D model. To be effective, the touch probe and the laser scanner must be integrated into the same product. A second claimed invention relates to this "dual mode" integration. (SMF ¶ 9.)

Third, a laser line scanner captures more data than it needs. This extraneous data can severely slow the creation of the 3D model, rendering an arm-mountable laser scanner less suited for many applications. A third claimed invention relates to the provision of a flexible "data processor" (or "device with a program") in the scanner itself to reduce the computational load on components later in the system. (SMF ¶ 10.)

Nikon Metrology's predecessor – 3-D Scanners – started marketing arm-mountable laser scanners embodying the inventions in 1996. (SMF ¶ 11.) 3-D Scanners, however, did not manufacture articulated arms. (SMF ¶ 11.) Rather, 3-D Scanners marketed its arm-mountable products alongside Faro, which was a manufacturer of articulated arms. (SMF ¶ 12.) In addition, Faro sold articulated arms to 3-D Scanners' distributors at wholesale, so that these distributors could sell a product with both components. (SMF ¶ 12.)

Despite knowledge of patent protection for 3-D Scanners' products, Faro launched its own arm-mountable laser scanner in late 2003. (SMF ¶ 13.) Faro sells this laser scanner (Faro's Laser Line Probe) in combination with its articulated arm, calling the combined product its Laser ScanArm. Since 2003, Faro has introduced a second and third version of its Laser ScanArm, [redacted] (SMF ¶ 14.) Once it launched its own arm-mountable laser scanner, Faro abandoned its relationship with 3-D Scanners, refusing to sell articulated arms to 3-D Scanners' distributors at the wholesale price. (SMF ¶ 13.)

Nikon Metrology brought this patent infringement suit in July 2008. The Court granted Faro leave to file its Second Amended Answer, Affirmative Defenses, Counterclaim and Demand for Jury Trial ("Second Amd. Counterclaim") on July 28, 2010. In that pleading, as it did in its First Amended Answer (Dkt. No. 63), Faro asserts two federal antitrust counterclaims and a state law unfair competition counterclaim.

B. Faro's Antitrust and Unfair Competition Counterclaims.

Faro's antitrust and unfair competition counterclaims are premised on the same alleged conduct, *viz.*, an alleged "attempt to enforce fraudulently obtained patents" against Faro in this litigation. (SMF ¶ 15; Second Amd. Counterclaim [Dkt. No. 130-1] ¶ 89; *see also id.* ¶ 85 (Count VII - "Counterclaim-Defendants have attempted to enforce patents that were obtained by fraud."); ¶ 96 (Count VIII - patents "were procured by knowing and willful fraud"); ¶ 106 (Count IX – alleging infringement suit based on patents "Counterclaim-Defendants have known, or should have known to be unenforceable and/or invalid" and that the patents "were procured by knowing and willful fraud"). The core conduct allegations underlying each of these counterclaims are the same as those alleged in Faro's inequitable conduct defense. (SMF ¶ 15; Second Amd. Counterclaim [Dkt. No. 130-1] ¶¶ 40-41, 44-45.)

The challenged conduct targets no one but Faro. Faro's counterclaims contain no allegations of any conduct directed toward any other competitor. [redacted]

[redacted]

Faro nonetheless alleges that Nikon Metrology threatens to gain monopoly power by means of this infringement suit. Specifically, Faro alleges the lawsuit creates "a dangerous probability that [Nikon Metrology] will succeed in [its] attempts to monopolize the market for laser scanning devices that attach to portable articulated arm coordinate measuring machines." (SMF ¶ 17; Second Amd. Counterclaim [Dkt. No. 130-1] ¶¶ 90, 102.) Asked for the factual basis for this contention, Faro responded as follows:

[redacted]

(SMF ¶ 17.) Thus, Faro identified no *facts* suggesting market power or a dangerous probability of monopolization.

C. Competition Faced by Producers of Arm-Mountable Laser Scanners.

Indeed, the facts suggest otherwise. Despite alleging that Nikon Metrology threatens to monopolize the alleged market, Faro maintains that firms manufacturing and selling "laser scanning devices that attach to portable articulated arm coordinate measuring machines" (hereinafter "arm-mountable laser scanners") face competition from a number of sources. First, it is undisputed that there are several manufacturers of arm-mountable laser scanners in addition to Faro and Nikon Metrology. Kreon, a French company, produces arm-mountable laser scanners that may be integrated with articulated arms manufactured by other companies. (SMF ¶ 18.) Perceptron, a Michigan based company, produces the ScanWorks series of arm-mountable laser scanners, which may be integrated with third-party arms. (SMF ¶ 18.) Hexagon produces its own line of arm-mountable laser scanners and markets Perceptron scanners, both of which Hexagon sells with its Romer Cimcore articulated arms. (SMF ¶ 18.)

[redacted]

[redacted]

(SMF ¶ 19.) Faro's expert on antitrust damages likewise maintains that arm-mountable laser scanners face competition from a wide variety of metrology products. (SMF ¶ 20.) [redacted]

III.
GOVERNING STANDARD

The purpose of summary judgment "is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *Rojas-Ithier v. Sociedad Espanola de Auxilio Mutuo y Beneficiencia de Puerto Rico*, 394 F.3d 40, 42 (1st Cir. 2005). The party moving for summary judgment bears the initial burden of asserting the absence of a genuine issue of material fact. *Mulvihill v. Top-Flite Golf Co.*, 335 F.3d 15, 19 (1st Cir. 2003). Once the moving party satisfies this burden, "the nonmovant must show, through materials of evidentiary quality, that such a dispute exists." *Rathbun v. Autozone, Inc.*, 361 F.3d 62, 66 (1st Cir. 2004). The "nonmoving party 'may not rest upon mere allegation ... but must set forth specific facts showing that there is a genuine issue for trial.'" *Braga v. Hodgson*, 605 F.3d 58, 60 (1st Cir. 2010) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)).

Although the Court must view the record "in the light most favorable to the nonmovant" and draw all reasonable inferences in favor of the nonmoving party, *Hoffman v. Applicators Sales and Service, Inc.*, 439 F.3d 9, 11 (1st Cir. 2006); *Poulis-Minott v. Smith*, 388 F.3d 354, 361 (1st Cir., 2004), this "notoriously liberal" standard, *Mulvihill*, 335 F.3d at 19, does not render summary judgment "a hollow threat." *Kearney v. Town of Wareham*, 316 F.3d 18, 22 (1st Cir. 2002). "An issue is 'genuine' for purposes of summary judgment if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Poulis-Minott*, 388 F.3d at 363 (quoting *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 90 (1st Cir. 1993)). In weighing whether a factual dispute is "material," the Court must examine the substantive law of the case because "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. The party objecting to summary judgment must therefore set forth specific facts proving a genuine issue of material fact in order to "deflect the swing of the summary judgment scythe." *Mulvihill*, 335 F.3d at 19.

IV.
ARGUMENT

To avoid summary judgment, Faro must overcome several severe hurdles. Faro must first vitiate the immunity that protects Nikon Metrology's assertion of its patents from antitrust and state tort liability. Given its allegations, this requires that Faro must prove in the current bench proceeding before the Court that Nikon Metrology engaged in inequitable conduct. Faro's failure to succeed in that proceeding dooms its antitrust and unfair competition counterclaims.

But regardless of how the Court comes out on the issue of inequitable conduct, Faro must also prove all the *other* elements of its antitrust counterclaims. Faro must therefore present evidence sufficient to allow a jury to find there is a dangerous probability that Nikon Metrology will gain monopoly power in the alleged relevant market through the challenged conduct. In addition, Faro must prove that Nikon Metrology's lawsuit has harmed competition in that market, not just Faro as a competitor.

This Faro cannot do. Faro cannot sustain its burden to show facts sufficient to define and prove its alleged relevant market; evidence from Faro's own experts and business executives directly contradicts Faro's allegations. Nor can Faro sustain its burden to show that there is a dangerous probability (let alone any probability) that Nikon Metrology will gain monopoly power by prosecuting this lawsuit. Faro has no evidence that Nikon Metrology has or could gain a dominant share of the alleged market, let alone exercise monopoly power even if it drove out all other arm-mountable laser scanner manufacturers. There also is no evidence of harm to competition. Faro cannot show that market-wide prices have increased, output decreased, or quality been diminished. At best, Faro can only show harm to itself, not competition.

Faro's unfair competition claim fails as well, as it is preempted by federal patent law. This claim is nothing more than Faro's attack on the enforceability and validity of the patents-in-suit dressed in different clothing. The claim thus turns entirely on federal patent law and is preempted.

A. A Finding that Plaintiffs Did Not Engage in Inequitable Conduct Bars Faro's Antitrust and Unfair Competition Counterclaims.

Should the Court find for Nikon Metrology on the issue of inequitable conduct, Faro's antitrust and unfair competition claims must be dismissed. Nikon Metrology's assertion of its patent rights is presumptively immune from antitrust and state law liability. To vitiate this immunity, Faro must prove by clear and convincing evidence either "(1) that the asserted patent was obtained through knowing and willful fraud within the meaning of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965), or (2) that the infringement suit was a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed. Cir. 1998). In other words, inequitable conduct is a "lesser and included" offense to Faro's antitrust and unfair competition counterclaims – a failure to prove (at least) inequitable conduct dooms these claims.

In its first antitrust counterclaim, Faro attempts to avoid antitrust immunity by alleging that the patents-in-suit were obtained through fraud on the patent office. (Second Amd. Counterclaim [Dkt. No. 130-1] ¶¶ 62-78, 82.) This is a so-called *Walker Process* claim. The fraud required for a *Walker Process* claim, however, "requires higher threshold showings of both intent and materiality than does a finding of inequitable conduct." *Nobelpharma*, 141 F.3d at 1070-71; *see also Dippin' Dots, Inc. v. Mosey*, 476 F.3d 1337, 1347 (Fed. Cir. 2007) (affirming finding of inequitable conduct but reversing finding of *Walker Process* fraud), *cert. denied*, 129 S. Ct. 2394 (2009). Faro's failure to prove inequitable conduct therefore "precludes a determination that it had borne its greater burden of establishing the fraud required to support its *Walker Process* claim." *FMC Corp. v. Manitowoc Co., Inc.*, 835 F.2d 1411, 1417 (Fed. Cir. 1987); *see also id.* at 1418 (antitrust plaintiff "broke its *Walker Process* sword when it failed to establish inequitable conduct"); *see also Daiichi Sankyo, Inc. v. Apotex, Inc.*, No. 030937 (SDW-MCA), 2009 WL 1437815, at *6 (D.N.J. May 19, 2009) ("If a finding of inequitable conduct may be insufficient to meet the more rigorous standard for *Walker Process* fraud, it logically follows that *Walker Process* fraud cannot be found in the absence of inequitable conduct."). In other words, should the Court determine that Nikon Metrology did not engage in inequitable conduct, this finding is "fatal" to Faro's *Walker Process* claim. *Applera Corp. v. Micromass UK Ltd.*, 204 F. Supp. 2d 724, 782 (D. Del. 2002) (entering judgment against *Walker Process* claim based on bench trial finding of no inequitable conduct).

Faro attempts to avoid the immunity in its second antitrust counterclaim and its unfair competition counterclaim by alleging that the infringement action was a sham, i.e., objectively baseless and brought in bad faith to harm Faro as a competitor. (Second Amd. Counterclaim [Dkt. No. 130-1] ¶¶ 96-97, 106.) The factual premise for these counterclaims is that Nikon Metrology allegedly enforced the patents-in-suit despite knowing that the patents were obtained by inequitable conduct and therefore invalid or unenforceable.[1] (*Id.* at ¶ 96 (alleging that Nikon Metrology enforced patents despite knowing "the Patents-In-Suit were invalid and unenforceable"); ¶ 106 (alleging enforcement although Nikon Metrology knew the patents were "unenforceable and/or invalid"); *see also id.* ¶¶ 40-41, 44-45 (allegations of inequitable conduct).) A finding of no inequitable conduct thus precludes these claims as well.

B. Faro Cannot Prove Essential Elements of Its Antitrust Counterclaims.

Aside from the issue of inequitable conduct, to sustain its antitrust claims Faro must still prove all of the other elements of those claims. *Walker Process*, 382 U.S. at 177-78; *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61 (1993) ("Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim."). Faro must therefore prove that Nikon Metrology (1) engaged in predatory or anticompetitive conduct, with (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). In addition, as a private plaintiff, Faro must also prove antitrust injury – that the challenged conduct harms competition, not merely Faro as a competitor. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990).

1. Faro Cannot Show a Dangerous Probability that Nikon Metrology Will Obtain Monopoly Power.

As the First Circuit has explained, the elements of attempted monopolization "take on meaning only with reference to an actual or potential exercise of power, which in turn must be assessed in the context of a relevant market." *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974). This is no less true in a case such as this involving the assertion of a patent. As the Supreme Court has explained, to prove attempted monopolization through the assertion of a patent obtained by fraud on the patent office, it is "necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure [the patent holder's] ability to lessen or destroy competition." *Walker Process*, 382 U.S. at 177.

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[1] As discussed below, because it is based on conduct before the patent office, Faro's unfair competition claim is preempted.

To show a dangerous probability of monopolization, Faro must therefore define and prove a relevant market and then demonstrate that, through the enforcement action, Nikon Metrology threatens to gain monopoly power in that market. *See Spectrum Sports*, 506 U.S. at 459 ("demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market"); *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1363-65 (Fed. Cir. 2004) (vacating jury verdict on *Walker Process* claim where plaintiff failed "to present any economic evidence capable of sustaining its asserted relevant antitrust market"), *rev'd on other grounds*, 546 U.S. 394 (2006).

a. Faro's Alleged Market Definition Fails.

Faro alleges that that there is a dangerous probability Nikon Metrology will obtain monopoly power in "the market for laser scanning devices that attach to portable articulated arm coordinate measuring machines." (Second Amd. Counterclaim [Dkt. No. 130-1] ¶¶ 90, 102.) Faro's failure to carry its burden to show material issues of fact with respect to relevant market is fatal to its antitrust claims. *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 919 (6th Cir. 2009) (affirming summary judgment on antitrust claim for failure to carry burden on market definition); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 197 (1st Cir. 1996) ("Proving market definition is the [antitrust] plaintiff's burden.").

A relevant product market is "composed of products that have reasonable interchangeability for the purposes for which they are produced … [B]ecause the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the relevant market rests on a determination of available substitutes." *Telecor Communications., Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1130-1131 (10th Cir.

2002); *see also Coastal Fuels*, 79 F.3d at 197 ("A market may be any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level. If sales from other producers substantially constrain the price-increasing ability of the hypothetical cartel, these others are part of the market."). "The touchstone of market definition is whether a hypothetical monopolist could raise prices." *Coastal Fuels*, 79 F.3d at 198.

Faro's own testimony precludes its alleged market definition. According to Faro, consumers faced with a market-wide price increase for arm-mountable scanners could turn to a number of other metrology products. [redacted]

Faro's expert for antitrust damages, Christopher Barry, similarly opined that there "are many other devices in the metrology market that provide the same function, i.e., to accurately and efficiently collect and digitize 3-dimensional coordinate measurements." (SMF ¶ 20.) He claims that "metrology is a very crowded field, with many competing devices, each of which has several competitors. Device types include fixed CMMs, laser trackers, white light scanners, articulated arms with laser line probes, arms with touch/hard probes, and handheld lasers and optical devices not tethered to arms .... For any given application, a customer has many products to choose from." (SMF ¶ 20.)

[redacted]

[redacted]

Moreover, Faro's own witnesses bluntly deny that a hypothetical monopolist could profitably raise prices. [redacted]

Similarly, Faro's expert for antitrust damages admitted that he could not say whether a hypothetical monopolist could profitably sustain a 10% or even a 5% price increase. (SMF ¶ 23.)

Where the antitrust plaintiff's "evidence cannot sustain a jury verdict on the issue of market definition, summary judgment is appropriate." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995). Summary judgment is especially "appropriate where the plaintiff's proposed market excludes potentially competing products." *Kaiser Found. v. Abbott Labs*, No. 02-2443-JFW (FMOx), 2009 U.S. Dist. LEXIS 107512, at *25 (C.D. Cal. Oct. 8, 2009) (granting summary judgment on *Walker Process* claim). Here, Faro completely failed to bring forth evidence upon which a jury could find that the relevant market is limited to "laser scanning devices that attach to portable articulated arm coordinate measuring machines." In fact, its own experts and executives contradict the alleged market definition. (SMF ¶¶ 19-23) Summary judgment therefore is appropriate. *See Golan v. Pingel Enter., Inc.*, 310 F.3d 1360, 1369 (Fed. Cir. 2002) (affirming summary judgment against antitrust claim based on bad faith assertion of patents and trademarks because antitrust plaintiff "failed to provide sufficient evidence to establish a relevant market").

b. The Challenged Conduct Cannot Lead to Monopoly Power.

In addition to Faro's failure to carry its burden on the issue of market definition, Faro's antitrust claims fail because Faro cannot show that the challenged conduct will lead to Nikon Metrology gaining monopoly power in the alleged market. *See AD/SAT v. Associated Press*, 181 F.3d 216, 229-30 (2d Cir. 1999) (affirming summary judgment where evidence showed antitrust plaintiff could not show dangerous probability defendant could obtain monopoly power).

First, Faro's monopolization theory is logically flawed. The only conduct Faro challenges is Nikon Metrology's prosecution of this infringement suit against Faro. (SMF ¶ 16.) There are no allegations (let alone any evidence) of any conduct directed toward other competitors. Under Faro's theory, therefore, Nikon Metrology could only drive Faro out of the market, and thus possibly gain monopoly power, by winning this action. But if Nikon Metrology is successful in the litigation, "that will necessitate a finding that [Nikon Metrology's] patents are valid and enforceable," and thus that the assertion of the patents is immune from antitrust liability. *Chip-Mender, Inc. v. Sherwin-Williams Co.*, No. C05-3465 PHJ, 2006 U.S. Dist. LEXIS 2176, at *11-13 (N.D. Cal. Jan. 3, 2006).

Second, Faro has no evidence that the allegedly anticompetitive conduct – Nikon Metrology's infringement suit – could lead to Nikon Metrology gaining monopoly power. To find a probability of success, courts generally require that the antitrust defendant possess a market share exceeding 50% of the relevant market prior to the commencement of the alleged attempt. *See, e.g., Springfield Terminal Ry. Co. v. Canadian Pac. Ltd.*, 133 F.3d 103, 105, 108 (1st Cir. 1997) (requiring "exceptional circumstances before straying from" minimum market share requirement); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 1001 (11th Cir. 1993) (reversing verdict for attempted monopolization because the defendant "possessed less than 50% of the market at the time the alleged predation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success … as a matter of law"); *CCBN.com, Inc. v. Thomson Fin., Inc.*, 270 F. Supp. 2d 146, 157 (D. Mass. 2003) (probability of successfully monopolizing a market is usually assessed through market share). [redacted] This is insufficient as a matter of law. *See AD/SAT*, 181 F.3d at 229 ("a 33 percent market share does not approach the level required for a showing of dangerous probability of monopoly power"); *Curtis Mfg. Co. v. Plasti-Clip Corp.*, 888 F. Supp. 1212, 1232 n.18 (D.N.H. 1994) ("unless defendants can demonstrate that Curtis held 50 percent or more of the United States domestic market, their antitrust claims will fail as a matter of law").

Moreover, even if Nikon Metrology's lawsuit drove Faro out of the market (by means other than success on the merits – because if the patents are valid and enforceable, there would be antitrust immunity, not an antitrust violation) and Nikon Metrology captured all of Faro's sales, there is no evidence it would enjoy a sufficient share of the alleged market to exercise monopoly power. Courts generally consider 70 to 75% the minimum market share necessary to support a finding of monopoly power. *See R. J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362, 394 (M.D.N.C. 2002) (collecting cases); *see also Springfield Terminal Ry.*, 133 F.3d at 108 (aggregation of alleged predator and target's market share only warranted in some cases such as where they are the only two competitors). [redacted]

While maintaining Faro's alleged relevant market, Faro's antitrust damages expert conceded that he cannot say that the challenged conduct could lead to monopoly power. He admitted that he had no idea whether Nikon Metrology could exercise monopoly power (i.e., profitably raise prices above the competitive level) assuming that Nikon Metrology had obtained the patents-in-suit by fraud on the patent office and was nonetheless able to drive out of the market every other arm-mountable laser scanner manufacturer. (SMF ¶ 26.)

c. Faro Cannot Rely on Comments in Certain Documents to Create a Genuine Issue of Material Fact.

In discovery, Faro has relied on comments in certain documents in support of its counterclaims. None of these comments, separately or combined, is sufficient to preclude summary judgment; they do not constitute evidence on the issue of actual market power or actual probability of monopolization.

[redacted]

[redacted] *See, e.g.*, *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 42-43 (2006) (rejecting presumption that patent confers market power when used in tying arrangement). And this sort of aspirational comment cannot support a finding of a dangerous probability of success; "[a] belief of an aspirant does not constitute evidence of the probability of realization of that aspiration." *Springfield Terminal*, 133 F.3d at 109 (affirming summary judgment for failure to show dangerous probability of monopolization and finding no error in refusal to consider evidence defendant aspired to acquire target after driving it into bankruptcy as part of an alleged plan to monopolize the market).

[redacted] *See, e.g.*, *Ky. Speedway*, 588 F.3d at 919 (affirming summary judgment antitrust claims, holding that lay testimony and internal marketing documents did not "provide a sound economic basis for assessing the market"). The use of the term "market" has "specific connotations for antitrust purposes .... [T]he fact that a company may refer to a 'market' [in a business document] does not necessarily mean that its reference will be to a market for purposes of the Sherman Act." *Nobel Scientific Indus., Inc. v. Beckman Instruments, Inc.*, 670 F. Supp. 1313, 1318-19 (D. Md. 1986), *aff'd*, 831 F.2d 537 (4th Cir. 1987). [redacted]

[redacted]

[redacted] In fact, prior to its acquisition of Metris, Nikon Corporation did not manufacture arm-mountable laser scanners or articulated arms. (SMF ¶ 28.) These documents, and Nikon's acquisition of Metris, have no bearing on the issues of market power or dangerous probability of monopolization; Nikon Corporation was not a player in the alleged relevant market. [redacted] *See Ky. Speedway*, 588 F.3d at 919; *Springfield Terminal Ry.*, 133 F.3d at 109; *Nobel Scientific*, 670 F. Supp. at 1318-19; *Home Health Specialists*, 1994 WL 463406, at *3.

In short, these documents do not change the undisputed facts – that even in the market Faro alleges (but cannot prove), Counterclaim Defendants do not and would not have sufficient market share to exercise monopoly power.

2. Faro Cannot Show Antitrust Injury.

Faro must also prove antitrust injury, i.e., that Nikon Metrology's conduct has harmed competition, not just Faro as a competitor. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("That [defendant's conduct] may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'"); *Mfg. Research Corp. v. Greenlee Tool Co.*, 693 F.2d 1037, 1043 (11th Cir. 1982) (affirming directed verdict against attempted monopolization claim where plaintiff failed to show harm to competition as a whole). In other words, Faro must show "injury to competition beyond the impact on [Faro]." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988); *see also Eichorn v. AT&T Corp.*, 248 F.3d 131, 140 (3d Cir. 2001) (even injured plaintiff cannot show antitrust injury unless "the activity has a wider impact on the competitive market").

To avoid summary judgment, Faro must therefore produce evidence of market-wide higher prices, reduced output, or reduced quality. *See Sullivan v. NFL*, 34 F.3d 1091, 1096-97 (1st Cir. 1994). Faro cannot do so. Faro has proffered no evidence that the challenged conduct has driven up market prices for arm-mountable laser scanners, has reduced the overall market output of those products, or has reduced the overall quality of products on the market – or even that these outcomes could conceivably occur.

[redacted] Even the complete elimination of a competitor, standing alone, is insufficient to show antitrust injury. *See, e.g.*, *Austin v. McNamara*, 979 F.2d 728, 739 (9th Cir. 1992). A delay in the launch of a new version of a product from one of several competitors cannot support a finding of antitrust injury. *See Patel v. Midland Mem. Hosp. & Med. Ctr.*, 298 F.3d 333, 346 (5th Cir. 2002) (holding that cardiologist did not suffer antitrust injury where conduct "did not eliminate him as a competitor.... [and] did not permanently block his plans to open a new hospital, but at best delayed them"). [redacted]

C. Faro's Unfair Competition Claim is Preempted.

State law claims are preempted by federal patent law if they are based on conduct before the patent office. *Semiconductor Energy Lab. Co., Ltd. v. Samsung Elecs. Co., Ltd.*, 204 F.3d 1368, 1382 (Fed. Cir. 2000) (New Jersey RICO counterclaims preempted by patent law because based on no more than "bad faith misconduct before the PTO"); *Abbott Labs. v. Brennan*, 952 F.2d 1346, 1357 (Fed. Cir. 1991) (state law abuse of process claim based upon misconduct before the patent office preempted). Here, Faro admits that its state law unfair competition claim is based on Nikon Metrology's assertion of patents that were allegedly "unenforceable and/or invalid" because supposedly they "were procured by knowing and willful fraud." (Second Amd. Counterclaim [Dkt. No. 130-1] ¶ 106; *see also id.* ¶¶ 40-41, 44-45.) Faro's unfair competition claim thus turns entirely on issues of federal patent law and therefore is preempted. *See, e.g.*, *In re K-Dur Antitrust Litig.*, No. 01-1652(JAG), 2007 WL 5297755, at *25 (D.N.J. Mar. 1, 2007) (state unfair competition claims preempted because "they rel[ied], either directly or derivatively, upon allegedly fraudulent or inequitable conduct before the PTO to substantiate those claims"); *CollegeNET, Inv. v. Xap Corp.*, No. CV-03-1229-HU, 2004 WL 2303506, at *8 (D. Or. Oct. 12, 2004) (state unfair competition claims preempted: "allegations of inequitable conduct cannot be pursued through an unfair competition counterclaim but rather need to be addressed in the patent litigation itself").

V.
CONCLUSION

Faro's antitrust and unfair competition counterclaims require more than simply allegations of inequitable conduct before the patent office. But Faro has failed to proffer any evidence to support these additional elements. The Court should therefore enter summary judgment dismissing these counterclaims.

RESPECTFULLY SUBMITTED,

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LOCAL RULE 7.1(A)(2) CERTIFICATION

I, Merton E. Thompson, attorney for the Plaintiffs, hereby certify that counsel for Plaintiffs/Counterclaim Defendants have conferred with counsel for Defendant/Counterclaimant, in a good faith effort to resolve or narrow the issues raised in this MOTION FOR SUMMARY JUDGMENT AS TO FARO'S ANTITRUST AND UNFAIR COMPETITION COUNTERCLAIMS (COUNTERCLAIM COUNTS VII – IX).

Merton E. Thompson, Esq.

CERTIFICATE OF SERVICE

I, Merton E. Thompson, Esquire, hereby certify that on August 27, 2010, I caused a copy of COUNTERCLAIM DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO FARO'S ANTITRUST AND UNFAIR COMPETITION COUNTERCLAIMS (COUNTERCLAIM COUNTS VII – IX) to be served electronically via email on all counsel of record.

Merton E. Thompson, Esq.

la-1083097

CERTIFICATE OF SERVICE

I, Merton E. Thompson, Esquire, hereby certify that on September 10, 2010, I caused a copy of COUNTERCLAIM DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO FARO'S ANTITRUST AND UNFAIR COMPETITION COUNTERCLAIMS (COUNTERCLAIM COUNTS VII – IX) (PUBLIC VERSION) to be served electronically via ECF on all counsel of record.

_/s/ Merton E. Thompson, Esq.________
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